93-928

~~No. 93-813~~

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

ATTORNEY GENERAL OF TEXAS, ETC., ET AL.,

Petitioners,

v.

JUDGE F. HAROLD ENTZ, ETC., ET AL.,

Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JUDGE WOOD'S BRIEF IN OPPOSITION TO CROSS-PETITION OF TEXAS ATTORNEY GENERAL

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QUESTION PRESENTED

1. Whether this Court should grant certiorari to reaffirm prior decisions holding that state officials lack the power to require the federal courts to enter "consent decrees" that restructure state government by "settlement agreement" between the state attorney general and private parties in violation of the constitutional and statutory rights of non-parties and objecting parties.

LIST OF PARTIES

The participants in the proceedings below were:

Plaintiffs:

LULAC Local Council 4434
LULAC Local Council 4451
LULAC (Statewide)
Christina Moreno
Aquilla Watson
Joan Ervin
Matthew W. Plummer, Sr.
Jim Conley
Volma Overton
Willard Pen Conat
Gene Collins
Al Price
Theodore M. Hogrobrooks
Ernest M. Deckard
Judge Mary Ellen Hicks
Rev. James Thomas

Plaintiff-Intervenors:

Houston Lawyers' Association
Alice Bonner
Weldon Berry
Francis Williams
Rev. William Lawson
DeLoyd T. Parker
Bennie McGinty
Jesse Oliver
Fred Tinsley
Joan Winn White

LIST OF PARTIES – Continued

Defendants:

Dan Morales, Attorney General of Texas
John Hannah, Secretary of State of Texas
Texas Judicial Districts Board
Thomas R. Phillips, Chief Justice, Texas Supreme Court
Mike J. McCormick, Presiding Judge, Court of Criminal Appeals
Pat McDowell, Presiding Judge, 1st Administrative Judicial Region
Thomas J. Stovall, Jr., Presiding Judge, 2nd Administrative Judicial Region
B. B. Schraub, Presiding Judge, 3rd Administrative Judicial Region
Olin Strauss, Presiding Judge, 4th Administrative Judicial Region
Darrell Hester, Presiding Judge, 5th Administrative Judicial Region
William E. Moody, Presiding Judge, 6th Administrative Judicial Region
Weldon Kirk, Presiding Judge, 7th Administrative Judicial Region
Clyde R. Ashworth, Presiding Judge, 8th Administrative Judicial Region
Ray D. Anderson, Presiding Judge, 9th Administrative Judicial Region
Joe Spurlock II, President, Texas Judicial Council
Leonard E. Davis

Defendant-Intervenors:

Judge Sharolyn Wood
Judge Harold Entz

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No. 93-813

In The

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ATTORNEY GENERAL OF TEXAS, ETC., ET AL.,

Petitioners,

v.

JUDGE F. HAROLD ENTZ, ETC., ET AL.,

Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JUDGE WOOD'S BRIEF IN OPPOSITION TO CROSS-PETITION OF TEXAS ATTORNEY GENERAL

Respondent Harris County District Judge Sharolyn Wood ("Judge Wood") respectfully files this Brief in Opposition to the Cross-Petition for Writ of Certiorari filed by the Texas Attorney General because the *en banc* Fifth Circuit Court of Appeals correctly followed controlling law in deciding this case in favor of the State of Texas and refusing to remand it for implementation of the Texas Attorney General's "settlement" when there was no violation of federal law.

OPINIONS AND JUDGMENT BELOW

Judge Wood incorporates by reference the statement of opinions and judgments below in her Cross-Petition, *Wood v. Attorney General of Texas.*

JURISDICTION

Judge Wood incorporates by reference Petitioners LULAC's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDERS INVOLVED

Judge Wood incorporates by reference the statement of Constitutional Provisions and Statutes Involved in her Cross-Petition, *Wood v. Attorney General of Texas.* Judge Wood adds only that the Texas Attorney General has included in the appendix to his Cross-Petition an order entered by the district court on January 11, 1990 at the request of then Attorney General Jim Mattox. Since the Defendant-Intervenors' interlocutory appeal had already been granted, the district court's order was void for lack of jurisdiction. The Order of the Fifth Circuit Court of Appeals, also entered January 11, 1990, which held that the district court was without jurisdiction, is included as Appendix C ("App. C").

STATEMENT OF THE CASE

This case is now a collusive § 2 Voting Rights Act case in which the Texas Attorney General and a powerful faction within his political party are attempting to use the federal judiciary to enforce their private "settlement agreement" to create law in place of the duly enacted state laws governing judicial elections. The relevant facts are set out in Judge Wood's Cross-Petition, *Wood v. Attorney General of Texas*, and Judge Entz's Brief in Opposition to Petition for Writ of Certiorari and are incorporated herein by reference.

Judge Wood adds only what the Texas Attorney General's statement of facts ignores, namely that the Plaintiffs chose a judicial forum to air their grievances because they could not achieve what they wanted through the regular election process. Their choice of a judicial forum necessarily involved the claim that Texas' state district judge election system was illegal under federal law. When the trial court agreed, there was an immediate "settlement" calling for subdistricting and partisan judicial elections which the trial court undertook to implement immediately without a remedial hearing. The "settlement" foundered solely on the trial court's independent insistence on his own preference for non-partisan judicial elections and the Defendant-Intervenors' interlocutory appeal on the merits based on their insistence that Texas' district judge election system did not violate federal law.[1]

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[1] The trial court's insistence on a non-partisan "remedial plan" indicates that what the court was really trying to say was that when partisan voting creates racial imbalance in elections, the partisan aspect must be eliminated. The proper course

The Texas Attorney General joined the Defendant-Intervenors' interlocutory appeal only after the Fifth Circuit accepted the appeal and stayed the "remedial plan." *See* App. C. Appellate review followed in the Fifth Circuit, which reversed the trial court, and in this Court, which reversed the Fifth Circuit's *en banc* holding that § 2 does not apply to the election of state district judges. Thereafter, when it began to appear on remand that the *en banc* appellate court might hold once more that Texas' district judge election system does not violate federal law, and therefore that the Plaintiffs might not be able to obtain from the courts what they could not obtain from the legislature and the people, the Texas Attorney General and the Plaintiffs held secret talks and agreed to a second "settlement" (again incorporating partisan elections) which they insisted that the Court of Appeals rubber-stamp by remand. That "settlement" would have drastically altered the laws of Texas to the settling parties' own partisan political benefit in disregard of the rights of the State Defendants charged with administering Texas' judicial election system, the Defendant-Intervenors (whom the Texas Attorney General still claims to represent in their official capacity but excluded from the "settlement" discussions), and the millions of Texas voters whose constitutional and statutory protections are violated by this illegal scheme.

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under *Whitcomb v. Chavis*, 403 U.S. 755 (1971), would instead have been for the trial court to refuse to find a violation of federal law – as Judges Wood and Entz maintained – not to impose a non-partisan "remedy" for racial imbalance due to partisan, but not racially discriminatory, voting.

When the Court of Appeals refused, *en banc*, to remand this case for "settlement," and instead decided it in *favor* of his client, the State of Texas, the Texas Attorney General attacked the Court of Appeals' judgment by Cross-Petition, seeking to perpetuate a case the State has won at state expense until he can get his "settlement."

REASONS FOR DENYING THE WRIT

I.

THE TEXAS ATTORNEY GENERAL IMPROPERLY SUPPORTS THE PLAINTIFFS' PETITION FOR CERTIORARI AND SEEKS REMAND OF A CASE DECIDED IN FAVOR OF THE STATE.

As Judge Wood predicted in her Cross-Petition, *Wood v. Attorney General of Texas*, Texas Attorney General Dan Morales has abandoned all pretense of opposing this suit as counsel for the Defendant State of Texas. He has now filed a Cross-Petition seeking a *de facto* reversal of the *en banc* judgment in *favor* of his client by remand of the case to implement a "settlement agreement" he has reached with the Plaintiffs that would change the form of state government.

In their Petition for Writ of Certiorari, the Plaintiffs seek reversal of this case on the merits and remand of their and Attorney General Morales' "settlement" for implementation. In his "Response" – *not* "Opposition" – to the Plaintiffs' Petition, the Texas Attorney General *supports* the Plaintiffs' request for remand for entry of "settlement" while insisting that he and he alone speaks for the *defense*; and he has filed his own Cross-Petition

seeking remand of a case which he, as the State of Texas' counsel, has nominally *won*.

As pointed out in Judge Wood's Brief in Opposition to the Plaintiffs' Petition, the issue whether the Court of Appeals should be required to remand this case for effectuation of "settlement" is moot in light of the Fifth Circuit's *en banc* holding that Texas' district judge election system does not violate § 2. The Court should not grant certiorari on the Fifth Circuit's proper refusal to remand a case for "settlement" where there is no violation of law. *See* App. at 18a-28a.

II.

THE TEXAS ATTORNEY GENERAL'S ATTEMPT TO USE THIS COURT'S "SUPERVISORY POWERS" TO ALTER TEXAS LAW IS A GRAVE ABUSE OF FEDERALISM.

Texas Attorney General Morales claims in his Cross-Petition that the Fifth Circuit Court of Appeals "contradicted this Court's expressed preference for settlements." Cross-Petition at 5. It did not. The Fifth Circuit recognized that this was no ordinary "settlement" but a bold grab for extraordinary power by a state official, and it refused to lend the enforcement powers of the federal judiciary to such abuse of power. Opinion at 9a-28a.

In his Cross-Petition, as below, the Texas Attorney General claims that he need not represent the officials who have been sued in this case. Cross-Petition at 9, 10. Instead, he claims sole absolute authority to speak for the State of Texas and to change a critical aspect of state government by "agreement" with private plaintiffs,

enforced through the federal judiciary, over the objections of his own clients, in the absence of any illegality in the laws he would change and in violation of many federal and state constitutional safeguards. This is an unprecedented claim to extraordinary power, not a mere exercise of ordinary settlement powers in litigation involving private interests, as the Court of Appeals recognized. Opinion, App. at 9a, 12a.

The Texas Attorney General condemns what he cails the Fifth Circuit's "adoption of a principle of compelled peristalsis of a bitterly fought, racially-charged case through the entire length of the federal judicial process." Cross-Petition at 7. He asks this Court for more "breathing room" and freedom from the "constrictions" of the Court of Appeals, as if this case were merely waste product being forced through the bowels of the federal court system. Cross-Petition at 6, 7. While the Texas Attorney General's scatological metaphor speaks eloquently to his ultimate opinion of this case and of the federal judicial process, it is deeply offensive to Judge Wood, as she assumes it is to this Court, not only for what it says about the Texas Attorney General's conception of this case but for what it says about his conception of the legal process itself.

The Court of Appeals is not merely "obstructionist," as this Attorney General insists. Cross-Petition at 6. The "settlement" or "consent decree" the Texas Attorney General and the Plaintiffs insist upon implementing through the injunctive power of the federal courts restructures the Texas judiciary and in so doing violates Texas' century-old and frequently ratified core policy of linking the jurisdiction and electoral base of its state district judges

to ensure their accountability to all of the persons subject to their primary jurisdiction and their independence from any faction. It violates a whole body of state constitutional and statutory protections, among them strong protections circumscribing the power of the Texas Attorney General to speak for the State and establishing and protecting the mechanisms for constituting and administering elections. Finally, it blatantly violates the principle of federalism enshrined in the United States Constitution – including protections guaranteed by the separation of powers doctrine, the Guaranty Clause, the Tenth Amendment, the equal protection and due process clauses of the Fourteenth Amendment, and the Fifteenth Amendment – by substituting law imposed by collusion between a political faction and a state official for laws duly enacted by the state legislature and consented to by the people. See *en banc* Opinion, App. at 28a, and *Wood v. Attorney General*.

Judge Wood is aware of no greater threat to the principle of constitutional representative government than this: that a State's attorney general – the State's own lawyer – should attempt to invoke the immense enforcement power of the federal judiciary to *reverse* a federal judgment in favor of the state and to impose his private political preferences by fiat on the people of the State – his clients – in place of duly enacted laws.

If this Court's supervision is called for, it is not, as the Texas Attorney General asserts, because the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision," Rule 10.1(a). It is because this state Attorney General has arrogated such power to himself as to raise a question of

federalism "which has not been, but should be, settled by this Court," Rule 10.1(c), namely, whether the Attorney General's activities in this case violate the separation of powers doctrine, the Guaranty Clause and the Tenth, Fourteenth, and Fifteenth Amendments. *See Wood v. Attorney General; see also en banc* Opinion, App. at 28a.

The Texas Attorney General's citation to authority for the proposition he advances is no less astounding than the proposition itself. The Attorney General cites *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 763 (1992) as authority for his claim that "[t]his Court has rejected propositions of law for the policy reason that doing so 'could serve as a disincentive to negotiation of settlements.' " Attorney General's Cross-Petition at 5. *Rufo* actually dealt with the question whether States can settle a dispute over the proper remedy for proven constitutional violations by undertaking to do more than the Constitution requires – a question which is unrelated to anything in these proceedings. *Rufo*, 112 S.Ct. at 762. However, in deciding that unrelated issue, this Court made an observation directly pertinent – and contrary – to the Attorney General's claim that he has the power to do anything he likes in the name of "settlement" and that the federal courts must enforce his will, like it or not. This Court held, "Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." *Id.*

Under the Texas Attorney General's theory, of course, there is no such thing as a State objection to any "settlement" he makes, since he *is* the State. However, under

ordinary principles of constitutional law and jurisprudence, the State's objections to the Attorney General's "consent decree" – which is aimed at restructuring critical aspects of state government to "cure" a violation in the absence of any adjudication that there is one – have been voiced by the Texas Legislature, which refused to enact his scheme into law; by the Chief Justice of the Texas Supreme Court, a named State Defendant, who objected to the "settlement" and hired his own counsel over the Attorney General's fierce opposition; by the Defendant-Intervenors, who objected as voters and as sitting district judges; by the Texas county and district judges from various counties who attempted to intervene as Defendants and whose interventions were rejected by the district court[2]; and by the silence of the people of Texas regarding a scheme of which they were kept ignorant.

To the extent *Rufo* speaks to this case, it says the opposite of what the Texas Attorney General would have the Court believe. *Rufo* says, in effect, that federal courts may not order states to replace their duly enacted laws with "laws" imposed by "consent decree" to which those who could object did object while those who should have been given the opportunity to object were not given that opportunity.

While no previous case in this Court has addressed as naked a claim of authority by a state official as this one, this Court has been very clear about the conditions under which state officials can enter "consent decrees"

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[2] *See, e.g., LULAC v. Midland County, Texas*, 884 F.2d 185 (5th Cir. 1990), and *en banc* Opinion, App. at 18a n. 11 (referencing the pending appeal of denial of the motion of Bexar County district judges to intervene).

over objections in ordinary cases affecting only private litigants. The Attorney General cites *Local Number 93, International Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528-29 (1986) for the proposition that an intervenor "does not have the power to block [a consent] decree merely by withholding its consent." Attorney General's Cross-Petition at 8. But his quotation is taken out of context.

In *Local Number 93*, the dissenting party had been given full opportunity to object to the consent decree and his objections were *judicially heard and ruled on*. *Id.* at 529. This Court immediately went on to state,

> Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. 3B Moore ¶ 24.16[6], p. 181; *see also, United States Steel Corp. v. EPA*, 614 F.2d 843, 85\45-846 (CA3 1979); *Wheeler v. American Home Products Corp.*, 563 F.2d 1233, 1237-1238 (CA5 1977). And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.

Id. The "settlement," which the Texas Attorney General worked out in secret with the Plaintiffs after excluding the Defendants from discussions, not only would deprive Judge Wood of her right to serve out her term in the

judicial system to which she was elected (as it would so deprive all state district judges); it would also deprive her of many State constitutional and statutory rights and protections as a state official, citizen and voter. *See* Opinion at 20a-21a. *Local Number 93* does not support the Texas Attorney General; it supports Judge Wood.

The Texas Attorney General fails entirely to cite *Firefighters v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576 (1984), in which this Court addressed the situation where settling defendants had obtained a favorable modification of a consent decree in a Title VII case over the objections of a non-settling defendant adversely affected by the modification and then attempted to walk away from the litigation. The Court stated, in a sentence particularly pertinent to these proceedings, "Respondents cannot invoke the jurisdiction of a federal court to obtain [a] favorable [ruling] and then insulate that ruling from appellate review by claiming they are no longer interested in the matter, particularly when the [ruling] continues to have adverse effects on other parties to the litigation." 467 U.S. at 572, 104 S. Ct. at 2584.

Nor does the Texas Attorney General cite *Martin v. Wilks*, 109 S.Ct. 2280 (1989), in which this Court held that a person's rights may not be adjudicated away by "consent decree" in a proceeding to which he has not been made a party – like the county and the district judges in Texas who attempted to intervene and were rebuffed and, even more egregiously, like the millions of Texas voters whose fundamental constitutional rights under the Guaranty Clause and the Tenth Amendment to determine the qualifications and structure of their own state government the Texas Attorney General – their own lawyer –

would spirit away by "consent decree." *Id.* at 2186; *see Gregory v. Ashcroft*, 111 S.Ct. 2395, 2402 (1990).[3]

The Texas Attorney General complains that the Fifth Circuit ignored *Kentucky v. Graham*, 473 U.S. 159 (1985), in which, he claims, "The Court directed that 'an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.' " He himself, of course, claims to be the only permissible spokesman for that entity. Attorney General's Cross-Petition at 9, 10. Putting aside the fact that *Kentucky* is a 42 U.S.C § 1988 attorneys' fee case and therefore inapplicable to this case (which perhaps explains why it was not cited by the Fifth Circuit), the Texas Attorney General's Cross-Petition evinces once again a critical error which the Fifth Circuit *did* address at length in its opinion – namely his claim to *be* the State of Texas, so that anything he says or anything he wants is what the State says or the State wants. The Fifth Circuit explained at length why this is a dangerous and insupportable concept on the part of the Attorney General. App. at 9a-17a. Yet what the Fifth Circuit called the Texas Attorney General's "bold claim of authority" resurfaces here in its full hubris.

Finally, the Texas Attorney General relies for support on *Wise v. Lipscomb*, 437 U.S. 535, 98 S.Ct. 2493 (1978), one of this Court's most important cases in *curtailing* the abuse of power by federal courts that would rush to

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[3] *Gregory*, which is central to the merits of this Voting Rights Act case as well as to the actions of this Attorney General, admonishes over-zealous partisans, like the Texas Attorney General, that "the Fourteenth Amendment does not override all principles of federalism." 111 S.Ct. at 2405.

implement remedies for *proven* constitutional violations without giving state legislatures the opportunity to do so. How the Attorney General can take comfort in *Wise* is elusive, since the reason for this Court's taking either the Attorney General's Cross-Petition in this case, if it decides to do so, or Judge Wood's Cross-Petition, seeking to realign and disqualify the Texas Attorney General for reasons he himself has made plain, can only be to extend the admonitions of *Wise* from overzealous federal judges, who will not let either state law or the United States Constitution stand in the way of their power to right a *proven* wrong, to overzealous members of a state executive branch who – scornful of the constitutional limitations on their powers and the legal and ethical restrictions on their office – would rush to right what they perceive to be a politically incorrect system.

Given the foregoing authority, which unambiguously rejects the claim of power which the Texas Attorney General asserts, and given the opinion of the Fifth Circuit, which thoroughly and eloquently rebuffed the Attorney General on all counts and in full accordance with controlling law except for its failure to realign and disqualify him, this Court should deny the Attorney General's Cross-Petition on its merits if it does not simply deny the issue he would raise as moot. Judge Wood asks, however, that if the Court grants the Attorney General's Cross-Petition or if it grants the Plaintiffs' Petition on the merits, it also grant her Cross-Petition seeking to realign the Texas Attorney General as a party and to disqualify him as attorney for the defense as a matter of law and equity and that it grant her the opportunity at oral argument to oppose the actions of the Attorney General and to defend the State of Texas on the merits. In a case of

Supreme Court magnitude, Texas is entitled to a lawyer – not a politician.

CONCLUSION

Respondent Judge Wood respectfully requests that the Court deny the Cross-Petition of the Texas Attorney General, *Attorney General of Texas v. Entz*, or, if it grants certiorari on the procedural issues raised, that it grant her Cross-Petition, *Wood v. Attorney General of Texas*, and realign the Texas Attorney General and disqualify him as counsel for the State of Texas. She further requests that the Court deny the Plaintiffs' Petition for Writ of Certiorari; or, alternatively, if it grants certiorari on the merits of this case, that it extend her intervention as necessary to permit her to defend the State of Texas at oral argument and that it affirm the *en banc* opinion of the Fifth Circuit Court of Appeals on the merits.

Respectfully submitted,

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8014

(Filed Jan. 11, 1990)

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, COUNCIL NO. 4434,

Plaintiffs-Appellees,

versus

WILLIAM P. CLEMENTS, ETC., ET AL.,

Defendants,

JIM MATTOX,

Defendant-Appellee,

versus

JUDGE F. HAROLD ENTZ, ETC., and JUDGE SHAROLYN WOOD, ETC. and GEORGE S. BAYOUD, JR., ETC.,

Defendants-Appellants.

and

TOM RICKHOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE and MICHAEL P. PEDAN, Bexar County, Texas State District Judges.

Appellants.

Appeals from the United States District Court for the Western District of Texas

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Before GEE, DAVIS and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellants' motion for stay pending appeal are GRANTED. We do so in order that the State of Texas may be allowed a reasonable opportunity to address the problem presented by the holding of the district court entered November 8, 1989, that the state system of selecting judges is invalid as violating Section 2 of the Voting Rights Act. *See* Chisom v. Roemer, 853 F.2d 1186 (5th Cir. 1988).

That holding, if sustained on appeal, will require an organic and wholesale review and reconstitution of the Texas judicial selection system, a task which should be addressed and carried out by the state's elected representatives, rather than by the federal courts. Only if it becomes apparent that the state is unwilling to act with measured and appropriate speed in this regard should our courts intervene. When the State has had a reasonable period within which to address the problem presented in a special session of the Legislature, the Court will entertain a motion to dissolve. That has not yet occurred; when it does, we will be amendable to a motion to dissolve the stay which we enter today. In the meantime, on our own motion, we EXPEDITE and consolidate the appeals from

the district court's orders of November 8, 1989, and January 2, 1990.[1]

It is further ORDERED that the motion for appellant Judge Sharolyn Wood, etc., for leave to consolidate this appeal with case number 89-6226 is DENIED. Instead, on its own motion the court consolidates this appeal with case number 90-9003.

It is further ORDERED that the motion of appellee Jim Mattox, etc., for leave to strike the notice of designation of independent counsel and the emergency application for stay filed on behalf of George S. Bayoud, Jr. is DENIED.

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[1] This appeal being founded on 28 U.S.C. §§ 1292(a)(1) and 1292(b), we need not concern ourselves about the motion pending before the trial court (denominated a "Rule 59(e)" motion in certain of the filings) to modify that court's interlocutory injunctive order. Rule 59(e) had no application to interlocutory orders, and the notice of appeal vests jurisdiction over this order in our court. *See* Coastal Corp. v. Texas Eastern Corp., 869 F.2d 817 (5th Cir. 1989).